would have been left penniless. Moreover, it is to be borne in mind that the husband had deserted the wife and had not taken care of her and the son for many years. Therefore, I am of the view that no deduction should be made in his favour for the damages he has had to pay to Keng Heng nor is the wife liable for any payment of brokerage fees if such a claim should be made in the future.

(5) Item 7 is for $75,000, a sum allegedly taken by the husband on an overdraft from the United Overseas Bank for his business in Malaysia. The wife wholly protests that such a claim should be made. She has no knowledge that moneys were taken for business by the husband. There is also no documentary evidence of the claim. This item must be rejected.

(6) Item 8 of $5,000 is for legal fees payable by the husband to his solicitors for this case. The wife makes no similar claim. Much as I sympathize with the position of the husband now, this claim has no merit.

(7) Finally, there is item 9: $5,662.85 for costs payable by the husband to the wife in OS No 655 of 1988. The Chief Justice had ordered that costs of and incidental to the application be paid by the husband. It means that the husband must personally bear the costs, not that it is to be deducted from any common property owned by the parties. In the sum of $5,662.85 is included the costs incurred for the charging order made consequent upon the Chief Justice's Order. That, too, must be borne by the husband personally.

On the determinations made on the specific issues raised in this hearing, the application of the husband is dismissed with costs.

Application dismissed.

Solicitors: *Tan Rajah & Cheah; YM Jumabhoy & Co; Derrick Jeffrey & Ravi.*

Reported by *Azra Moiz*

MALAYSIAN REPORTS

Tang Hee Hing v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 43 OF 1986
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
25 JANUARY 1991

Criminal Procedure — Plea — Qualified plea — Plea of guilty to charge of trafficking in dangerous drug — Accused convicted on plea of guilty and evidence of prosecution — Mandatory death sentence — Court must be satisfied that plea is unequivocal — Meaning of plea of guilty

The appellant in this case had been tried with another co-accused on two charges of trafficking in raw opium. At the end of the prosecution case the other accused was acquitted but the appellant was called to enter his defence. In his evidence the appellant denied the statement he had made in a cautioned statement which had been admitted but in cross-examination said: 'Even until today I am prepared to plead guilty if the second accused could be released. I do so because I do not want her to get involved. As the opium belong to me. No one advised me to plead guilty.' The appellant was convicted and sentenced to death. He appealed.

Held, ordering a retrial:

(1) In his grounds of judgment the judge convicted the appellant based on the appellant's supposed plea of guilty and the evidence of the prosecution and not on the evidence alone. Before a plea of guilty could be accepted by the court, the court must be satisfied that the plea is unequivocal. In this case it is clear that the plea is a qualified plea and when the plea is not clear, doubtful or qualified, it should not be accepted as a plea of guilty.

(2) Where capital punishment is involved, it must clearly be shown that the accused knew not only the nature of his plea but also the nature of punishment he was liable to receive as a consequence of his plea.

(3) The real meaning of a plea of guilty is that the accused agrees to all the ingredients of the offence and all the averments in the charge.

[Bahasa Malaysia summary

Perayu di dalam kes ini telah dibicarakan bersama dengan seorang tertuduh lain atas dua tuduhan mengedar candu mentah. Apabila tamat kes bagi pihak pendakwa, tertuduh yang satu lagi itu telah dibebaskan akan tetapi perayu telah diminta membela dirinya. Di dalam keterangannya perayu telah menafikan pernyataan di dalam pernyataan beramaran yang dibuat olehnya dan yang telah diterima akan tetapi di dalam pemeriksaan balas ia berkata:

'Hingga hari ini pun saya bersedia mengaku salah jika tertuduh kedua dibebaskan. Saya membuat demikian oleh kerana saya tidak mahu ia dibabitkan. Oleh kerana candu itu saya yang punya. Tidak sesiapa pun menasihatkan saya supaya mengaku salah.'

Perayu telah disabitkan dengan kesalahan itu dan dihukum mati. Ia telah merayu.

Diputuskan, memerintahkhan perbicaraan semula:

(1) Di dalam alasan penghakimannya, hakim yang arif telah mensabitkan perayu atas pengakuannya yang disangkakan itu dan keterangan pihak pendakwa dan bukan atas keterangan sahaja. Sebelum sesuatu pengakuan bersalah boleh diter-

ima oleh mahkamah, mahkamah mesti berpuas hati bahawa pengakuan itu adalah pasti. Di dalam kes ini adalah jelas bahawa pengakuan itu adalah bersyarat dan bila pengakuan itu tidah jelas, meragukan atau bersyarat, ia tidak patut diterima sebagai pengakuan bersalah.

(2) Apabila hukuman mati terbabit, mestilah ditunjukkan dengan jelas bahawa yang tertuduh mengetahui bukan sahaja sifat pengakuannya tetapi juga sifat hukuman yang akan diterimanya akibat pengakuan itu.

(3) Makna sebenar pengakuan bersalah ialah bahawa yang terduduh bersetuju kepada semua bahagian kesalahan itu dan juga semua pernyataan di dalam dakwaan.]

Case referred to

1 *Lee Weng Tuck & Anor* v *PP* [1989] 2 MLJ 143 (folld)

Appeal from: Criminal Trial No 6 of 1984 (High Court, Ipoh)

Dato' Paramjit Singh for the appellant.

CT Wong (Miss) (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): On 24 July 1986 the appellant was convicted for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) punishable under s 39B(2) of the Act and was sentenced to death in the High Court, Ipoh. On appeal we set aside the conviction and sentence and ordered a retrial. We now give our reasons.

The appellant was originally charged with another co-accused, a female, on two charges under s 39B(1)(a) of the Act and one charge under s 10(2) of the Act. The charges stated that on 24 October 1983 they were allegedly trafficking in raw opium weighing 1,583.8g and prepared opium weighing 4,056g and they were also allegedly on the same date and place to be in possession of various opium smoking utensils.

The prosecution closed after calling 14 prosecution witnesses who were mostly formal witnesses. The evidence adduced was that after his arrest the appellant brought police officers to the premises where the exhibits were recovered. The premises in question, ie premises No 73-B, Jalan Yang Kalsom, Ipoh was rented to the female accused and the appellant was staying with her. There was also admitted a cautioned statement made by the appellant which the learned judge held to be a voluntary statement. The cautioned statement was admitted as exh P40. In the statement the appellant admitted that the opium belonged to him.

At the close of the prosecution case the learned judge acquitted the female accused and called the appellant to enter his defence. The appellant's testimony was brief. The gist of his examination-in-chief appears in a few sentences appearing at pp 137-139 of the appeal record where he denied the statement he made in exh P40. In his cross-examination he repeated what he said in the trial-within-a-trial in relation to exh P40 that:

> Even until today I am prepared to plead guilty if the second accused could be released. I do so because I do not want her to get involved. As the opium belong to me. No one advised me to plead guilty.

He was duly convicted and sentenced to death.

The grounds of judgment of the learned judge was written on 26 January 1988, that is, nearly two years after the conviction. In the grounds of judgment there was a narration of the facts adduced in the evidence and on the last page of the grounds the following appears:

> The accused has made a round about turn. The court has considered this change of stand with great care. But I have found no reason to reject the stand taken by the accused. I accepted his evidence after being satisfied that he understood the nature and consequences of his statement.
>
> In the light of this plea and in the light of the evidence adduced by the prosecution, I found the accused guilty and accordingly convicted and sentenced him to death.

Two things need to be observed in the grounds of judgment of the learned judge. Firstly, it was the learned judge's finding that the appellant had made a round about turn. It is a fair conclusion that this round about turn means the admission by the appellant that the opium belonged to him as stated in the appellant's cross-examination. But a perusal of the cross-examination will reveal that the appellant was merely referring to the statement he made in the trial-within-a-trial with regard to P40, that is, he was prepared to plead guilty if the second accused could be released.

Secondly it is also to be observed that in his grounds of judgment the learned judge convicted the appellant based on the appellant's supposed plea of guilty *and* the evidence of the prosecution.

It is elementary that even if what the appellant said amounted to a plea of guilty, before such a plea could be accepted by the court, the court must be satisfied that the plea is unequivocal. In this case it is clear that the plea is a qualified plea. When the plea of guilty is not clear, doubtful or qualified it should not be accepted as a plea of guilty.

The first two charges against the appellant carry the mandatory death sentence. It is to be observed that the amendment to impose the mandatory death sentence by Act A553 on 14 April 1983 was enacted only a few months before the date of the charges. Even assuming what the appellant said amounted to a plea of guilty, where capital punishment is involved, it must clearly be shown that the accused knew not only the nature of his plea but also the nature of the punishment he was liable to receive as a consequence of his plea. This court emphasizes that aspect of the procedure to be followed recently in *Lee Weng Tuck & Anor* v *PP*:[1]

In capital cases, we are of the view that even if the accused is represented by counsel when he pleads guilty, there must be some indication on record to show that the accused actually knows not only the nature of his plea of guilty to the charge, ie the nature of the capital offence he is pleading to, but also the consequences of his plea, ie there will be no trial and that the sentence of death may be imposed on him even though such sentence is not mandatory.

What was said in *Lee Weng Tuck*[1] is especially applicable in the present case because the amendment Act which imposed the mandatory death sentence had only recently been passed and it is not known that the appellant was aware of the amendment.

The real meaning of a plea of guilty is that the accused agrees to all the ingredients of the offence and all the averments in the charge. Can it be said that this requirement is satisfied in the present case where the word 'traffic' is used in the first two charges although we know that under our law the word 'traffic' is the result of the presumption arising from possession of drugs above the statutory amount? Can it be said then that the appellant here understood the true ingredients of the charge?

There is no indication in the appeal record and the notes of proceedings what was the basis for the acquittal of the second accused and the calling of the appellant to enter his defence except that there is a note to the effect that 'no prima facie case' had been made against the second accused. Since the prosecution evidence, if any, was that of possession, then it is fair to conclude that the appellant was called upon to enter his defence on the presumption of trafficking based on the amount of opium found in the premises.

To summarize, what appears from the record here is that the court in this case accepted the plea of the appellant which is a qualified plea and considered the evidence before him in the light of the plea. This is clear when the learned judge wrote in the notes that the conviction was based on the plea *and* the evidence of the prosecution. This also implies quite clearly that the learned judge could not have based the conviction on the evidence alone.

Where the trial court has accepted an imperfect plea the appellate court may quash the conviction and has a discretion to order or not to order a retrial. In the light of what was stated earlier with regard to the plea, it was our view that the conviction was not a true and satisfactory conviction and should be quashed. In the circumstances of this case we ordered a retrial. Conviction quashed. Retrial ordered.

Order accordingly.

Solicitors: *Paramjit & Co.*

Reported by *Prof Ahmad Ibrahim*

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-373-90
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
24 JANUARY 1991

Landlord and Tenant — Lease — Lessors occupying property on monthly tenancy after expiry of lease — Property sold by public auction and certificate of sale issued — Tenancy not protected by endorsement prior to date of registration of certificate of sale — Whether purchasers entitled to vacant possession — National Land Code 1965, s 267

Land Law — Lease — Monthly tenancy not protected by endorsement prior to date of registration of certificate of sale — Whether purchasers of property entitled to vacant possession — National Land Code 1965, s 267

Civil Procedure — Order for possession — Whether court has jurisdiction to make order during interlocutory proceeding — Statement of defence not filed — Rules of the High Court 1980, O 33 rr 5 & 21

Civil Procedure — Res judicata — Purchaser's application for possession of property under O 89 dismissed — Appeal abandoned — Final order for possession subsequently made during interlocutory application by tenant — Whether order invalid by reason of res judicata — Rules of the High Court 1980, O 33 rr 5 & 21

Land Law — Licence — Termination — Whether licence terminated by service or issue of writ for proceedings claiming possession.

The appellants were the lessees of a property on which they ran the business of a hotel. The lease was for ten years with an option for renewal. At the expiry of the lease, the option for extension was never exercised but the appellants continued occupation of the said property. Subsequently, the property was sold to the respondents by public auction after a foreclosure action by the chargee of the property. The certificate of sale was duly issued by the senior assistant registrar of the High Court. The respondents thereupon applied for possession of the property under O 89 of the Rules of the High Court 1980 but this application was dismissed in the High Court. The appeal against that order was abandoned.

The appellants later applied for a declaration that they were the lawful tenants of the said property and for a restraining order against the respondents. The restraining order was granted. The respondents then applied to set aside the restraining order and after a hearing inter partes, the learned judge of the High Court discharged the order and also made an order for vacant possession of the property to be given to the respondents. See [1991] 1 MLJ 221. The appellants appealed.

Held, dismissing the appeal:

(1) The earlier judgment of the High Court dismissing the respondents' claim was confined to the facts before the court and limited to the proposition that since the occupants claimed that they were tenants holding over, the summary procedure under O 89 of the Rules of the High Court 1980 was not proper. The question of res judicata or issue estoppel did not arise.